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No. 83-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Petitioners,

v.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an administrative agency of the State of Kansas,

Respondents.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

PETITIONERS' RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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PETITIONERS' RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTRODUCTION

The position taken by the United States in its brief, relating to the proper construction of Section 306, strongly supports the position of Petitioners in this case. By way of emphasis, Petitioners note the following points made in the brief of the United States, which are identical to

points asserted by Petitioners throughout the course of this litigation:

(a) On its face Section 306 refers to the "true market value" of railroad property and makes that factor an integral element of the statutory test for discriminatory taxation. (p. 10).

(b) Nothing in the statute suggests in the least that, contrary to usual litigation procedures, a district court would be barred from determining all controverted issues of fact material to the controlling legal standard and instead must accept as true the state's determination of valuation even though it is contested by the railroad. (p. 10).

(c) Congress clearly indicated its understanding that the question of value would be subject to litigation in cases under Section 306 by providing expressly in Section 306(2)(d) that "the burden of proof with respect to the determination of assessed value and *true market value* shall be that declared by applicable state law." (p. 10).

(d) Given the important remedial objective of the legislation, it is implausible to assert, as the court of appeals did, that Section 306 was not "intended to provide relief from every form of de facto discrimination." (p. 10).

(e) Precisely the same discrimination results whether commercial and industrial property is undervalued or railroad property is overvalued. Congress could not have intended to exclude valuation claims of de facto discrimination and thereby allow states a ready means to evade the statutory strictures. (p. 11).

(f) Congress understood that "true market value" is an objective economic concept that is generally the aim—although not necessarily the actual result—of state assessments. This congressional understanding refutes the suggestion

that the value of rail property should not be open to litigation under Section 306. (p. 12).

(g) "True market value" is a standard to which values that have already been determined must be compared. Thus, while Section 306 does not require a state to change its assessment standards, the value determined thereunder by the state must be compared to the true market value standard of Section 306. (p. 12).

(h) The court of appeals erred in holding that the "intent" of state officials is the decisive factor under Section 306. On the contrary, Section 306 refers not to intent but to "actions" and makes unlawful the mere commission of any of the enumerated acts. (p. 13).

(i) "[A] valuation claim is cognizable under the statute if it is alleged and proven that the overvaluation constitutes discrimination against the railroad." (p. 14).

Despite this accurate analysis of Section 306 and its purpose, the United States comes to the incongruous conclusion that further review of the case is not warranted. It offers two grounds which it suggests support this conclusion: (1) this Court's customary standards for certiorari are not met; and (2) the district court found that Petitioners had not demonstrated that their property was in fact overvalued. Petitioners disagree with the United States on both points.

ARGUMENT

1. This Case Involves A Decision By A Federal Court Of Appeals On An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court, And Therefore Meets The Standard Of Rule 17.1(c).

Petitioners have stated in their petition (pp. 13-17) the reasons why this important question should be settled by

this Court now. Simply stated, the decision below would thwart the intent of Congress in enacting Section 306, since it would open the door to widespread discrimination through overvaluation of railroad property, subject only to an ill-defined and nebulous "intent" test which has no support in the statute. Precisely the same point is made by the United States in its brief. (p. 11) Despite the clear danger thus threatened,[1] the United States recommends against review by this Court because "[t]he question presented is one of statutory construction, and there is no conflict among the circuits on the issue." (p. 16)

Rule 17.1(c) does not require a conflict among the circuits. The rule requires only that the court below "has decided an important question of federal law which has not been, but should be, settled by this Court."

Congress has determined that discriminatory taxation of rail transportation property by states is a problem of national concern. Remedial legislation was considered vital since the Senate Committee on Commerce found that in the nine years preceding 1969, railroads had been assessed more than nine hundred million dollars in discriminatory taxes and that these taxes increased transportation costs to the consumer:

> Ultimately, the shipper and consumer pay the bill for discriminatory taxation. Not only are such taxes reflected in the transportation costs of goods purchased by the consumer, but also the consumers of

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[1] Kansas, New Mexico, Oklahoma, Utah and Wyoming, five of the six states in the Tenth Circuit, are among those states singled out by Congress as having the highest degree of discrimination against railroads at the time anti-discriminatory tax legislation was being considered. S. Rep. No. 91-630, 91st Cong., 2d Sess. 5 (1966). The Senate Report indicates that those five states alone, in 1968, imposed more than $12,000,000 in discriminatory taxes on railroads.

> the States which do not discriminate are forced to share the costs of these burdensome tolls.

S. Rep. No. 91-630, 91st Cong., 1st Sess. 3 (1969).

The Committee concluded that these discriminatory tax practices were weakening the national transportation system and burdening the Nation's consumers and, therefore, must be eliminated. Accordingly, Congress determined to put an end to discriminatory state taxation of railroads by enacting Section 306.

The effect of a denial of certiorari in this case will be that the Tenth Circuit's erroneous interpretation of Section 306 will be allowed to stand and discrimination will not be eliminated in the Tenth Circuit, at least, until an actual conflict in the circuits occurs and another case can be brought before this Court.[2] Meanwhile, the Tenth Circuit's decision could exert an improper influence in other circuits on the implementation of this important aspect of national transportation policy.[3]

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[2] Presently, in addition to Kansas, litigation is pending in Colorado, Utah, and Oklahoma in which specific claims of discrimination resulting from overvaluation have been raised. *Burlington Northern R.R. Co., et al.*, v. *Duncan*, No. 83-4202 (D. Kans.); *Missouri Pacific R.R. Co., et al.*, v. *Maurer*, Nos. 82-C-1445, 83-C-1536 (D. Colo.); *Southern Pacific Transportation Co.* v. *Utah Tax Commission*, Nos. C-82-1037W, C-83-1118W (D. Utah); *Burlington Northern R.R. Co.* v. *Oklahoma Tax Commission*, Nos. 83-419R, 83-2165R (W.D. Okla.). Those states will be able to continue to impose discriminatory taxes upon railroads, burdening interstate commerce and requiring shippers and consumers in other states to pay for this discrimination, unless the railroads are able to show that the discrimination was intentional, the requirement erroneously enunciated by the Tenth Circuit.

[3] In addition to cases in the Tenth Circuit, litigation is pending in California, Georgia, and Iowa involving claims of discriminatory overvaluation of rail transportation property under Section 306.

Furthermore, the development of a conflict which could result in another case being presented to this Court is difficult to envisage. If another circuit should decline to follow the "intent" rule of the Tenth Circuit, and should grant relief to a railroad litigant, there is no assurance that the state would seek review by this Court. On the other hand, if, subsequently, yet another circuit should agree with the Tenth Circuit, that court would dismiss the complaint and dissolve the injunction (if one had ever been granted) for failure to prove intent, leaving the railroad no recourse but to pay the disputed taxes. Recent cases, however, have held that Section 306 grants prospective relief only and does not permit refund of taxes once they have been paid. *Burlington Northern R.R.* v. *Bair*, No. 83-100-A (S.D. Iowa, April 20, 1984) (reprinted in Appendix A); *Atchison, Topeka & Santa Fe Ry.* v. *Lennen*, Nos. 82-1873, 82-1878, 82-1891 (10th Cir., April 27, 1984), *reversing* 531 F.Supp. 220 (D. Kan. 1980) (reprinted in Appendix B). Thus, once the taxes had been paid the case would become moot since no remedy could be afforded. Accordingly, the railroad would be without any way to seek review of the issue by this Court.

In this case Petitioners have been successful in keeping an injunction in place in order to protect their rights on appeal. The Tenth Circuit, in fact, stayed the issuance of its mandate, thereby continuing the injunction, in order to preserve Petitioner's right to petition this Court for certiorari. If certiorari is denied in this case it may not be possible in another case to keep an injunction in force long enough to secure review by this Court.

Southern Pacific Transportation Co. v. *State Board of Equalization*, No. C-81-4848 S.W. (N.D. Cal.); *Southern Railway Co., et al.*, v. *State Board of Equalization*, No. C-81-695A (N.D. Ga.); *Burlington Northern Railroad Co.* v. *Bair*, No. 83-100A (S.D. Iowa).

In other cases which involved federal statutes limiting state taxation of interstate commerce, this Court has consistently exercised jurisdiction to insure proper interpretation of those statutes, *e.g.*, *Aloha Airlines, Inc.* v. *Director of Taxation of Hawaii*, 104 S.Ct. 291 (1983); *Arizona Public Service Commission* v. *Snead*, 441 U.S. 141 (1979); *Heublein, Inc.* v. *South Carolina Tax Commission*, 409 U.S. 275 (1972). Those cases came before this Court on appeal rather than by petition for certiorari; nevertheless, they signify that this Court ascribes importance to a proper interpretation of federal statutes regulating state taxation of interstate commerce. An erroneous interpretation of Section 306, affecting not just a single state but many states, should not be permitted to stand simply because access to this Court is by way of certiorari rather than appeal.

The issue to be decided is now squarely before this Court, and no purpose will be served by waiting to a later time to correct the Tenth Circuit's erroneous interpretation of Section 306.

2. The District Court's "Finding" Does Not Foreclose Review Of This Case.

The United States suggests that this case "does not seem well suited" for review of the issue, because "[t]he district court found that petitioners had not demonstrated that their property was in fact overvalued." Petitioners submit that the quoted statement does not accurately describe the holding of the district court. In its order the district court stated: ". . . we do not find that the railroads have shown that the defendants overvalued their property *under the guidelines established by Kansas law.*" (Pet. App. 32a). [Emphasis added]. In its supplemental opinion, the district court stated: ". . . we do not find that the plaintiffs demonstrated reasonable cause

to believe that the defendants, *under standards provided under Kansas law*, overvalued the plaintiffs' property in 1982." (Pet. App. 27a). [Emphasis Added].

These gratuitous "findings" can only be taken to mean that the Kansas taxing authorities had followed Kansas procedures and guidelines in a manner that appeared to be routine and not irregular. The district court made no finding that the state's suggested figure was the railroad's true market value; instead, it found only that the property of the railroads was not overvalued according to "guidelines established" or "standards provided" under *Kansas* law. But as the United States recognizes, and as Petitioners have consistently maintained, the law of Kansas (or of any particular state) is not the standard to be used in comparing assessments under Section 306. Section 306 establishes an objective standard (true market value) to which assessments of rail transportation property must be compared. The United States correctly points this out in its brief:

> Congress understood that "true market value" is an *objective economic concept* that is generally the aim—although not necessarily the actual result—of state assessments. (p. 12). [Emphasis added].

Thus, the federal court must objectively determine the "true market value" of rail transportation property without regard to state "guidelines" and "standards" in order to make the comparison required under Section 306.

On this point, the court of appeals merely determined that the railroads had not met the intent requirement it had enunciated. The United States acknowledges at page 17 of its Brief that the Tenth Circuit never reached the question of the true market value of the railroads.

CONCLUSION

This case presents a question of national importance, involving the proper interpretation of a federal statute designed to implement national transportation policy. This question should be decided by this Court now, so that this national policy may be developed in a consistent manner on a nationwide basis and that discrimination contrary to this policy will not be permitted to exist. It is important, also, that this Court decide the case now, in order to define and protect the interests of litigants in other cases involving the same issue both in the Tenth and in other circuits. If the decision of the Tenth Circuit is incorrect, as both the Petitioners and the United States assert, this Court should decide the case now, rather than awaiting a conflict, so that national transportation policy will not be frustrated.

This case involves a real and substantial controversy between the parties, the outcome of which depends upon the resolution of the issue before this Court. The "findings" of the district court do not foreclose review, since they were made upon an erroneous interpretation of Section 306. The case should be remanded so that proper findings, after hearing, may be made in accordance with the objective standard of true market value required by Section 306.

For all the above reasons, the writ should be granted. Additionally, the railroads submit that, in view of the Brief of the United States confirming that the decision of

the Tenth Circuit is erroneous, this is a proper case for summary disposition on the merits in favor of the railroads pursuant to Rule 23 of the rules of this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIV NO. 83-100-A

THE BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

vs.

GERALD D. BAIR, Director of the
Department of Revenue of Iowa,
Defendant.

FILED

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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

RULING AND ORDER ON PERSONAL PROPERTY TAXATION ISSUE

Plaintiff filed this action alleging that the State of Iowa's personal property tax system discriminated against plaintiff in two ways, thus violating Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210 § 306, 90 Stat. 31, 54-55, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News. 180-81 [hereinafter "Section 306"].[1] Plaintiff

[1] Section 306 is currently codified, with minor amendments, at 49 U.S.C. § 11503. The minor amendments included in the codified

contends: (1) that in tax years 1979, 1980, 1981, and 1982, the State of Iowa assessed and collected or sought to collect tax payments on plaintiff's personal property while effectively allowing nearly all other personal property owners to exempt their commercial and industrial personalty from *ad valorem* taxation; (2) that in tax years 1981 and 1382, the State of Iowa assessed all of plaintiff's property in Iowa at a level well-above its true market value; and (3) that for tax years 1981 and 1982, the State of Iowa assessed all commercial and industrial property locally-assessed in Iowa at a level that is much lower than the level at which plaintiff's property was assessed.

On April 4, 1983, the court preliminarily enjoined defendant from collecting more than fifty percent of the *ad valorem* tax payments assessed against plaintiff for the second half of tax year 1981. The parties agreed to a similar injunctive order for subsequent taxes.

The third contention ((3), *supra*) was severed from the first two contentions. The trial on the first two issues was held from December 12 to December 16, 1983. The Court ordered posttrial briefing, which was completed March 5, 1984.

Although the first issue is not complicated, the second issue involves complex tax-assessment and tax-accounting questions. In the interest of allowing the parties to know of the Court's determinations as soon as possible, the Court has decided that it should issue its

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version are not to be construed as making a substantive change to Section 306. Revised Interstate Commerce Act of 1978, Pub. L. 95-473, 92 Stat 1337, 1466, 95th Cong. 2d Sess., *codified at* 49 U.S.C. Subtitle IV. The parties have stipulated that the language of Section 306 shall govern in circumstances in which there is a conflict between Section 306 and 49 U.S.C. § 11503. Pretrial Stipulation, paragraph 2.

ruling on the first issue and, subsequently, issue a separate ruling on the second issue. Initially, the Court must address a contention raised by defendant before trial by motion to dismiss.

I. Defendant's Motion to Dismiss Plaintiff's Request for Tax Payment Refunds.

Plaintiff paid its property taxes to the State of Iowa for tax years 1979 and 1980 without protest. The first half of tax year 1981 was paid before filing this action under protest. Plaintiff now requests the Court to order defendant to refund that portion of its 1979, 1980, and first-half 1981 property tax payments which is allocable to personal property. The Court finds that it is not within the Court's power to order refunds of any taxes paid to the State before the filing of a Section 306 action.

A. The language of Section 306 does not provide for tax payment refunds.

Section 306(2) provides that United States district courts have jurisdiction to grant mandatory or prohibitive injunctive relief as is necessary to prevent, restrain, or terminate acts in violation of Section 306(1). The acts proscribed by Section 306(1) are the assessment, levy, or collection of a discriminatory property tax, or the imposition of any other type of discriminatory tax. Plaintiff argues that a reasonable interpretation of the word "terminate" should result in a determination that United States district courts are vested with authority to order refunds of taxes paid before the filing of a federal action.

The Court finds that the language of sections 306(1) and 306(2), when read *in pari materia* and in light of 28 U.S.C. § 1341, evince an intent on Congress's part to allow the United States district courts to halt any state acts that would result in the state attaining payments

through the implementation of a tax system that discriminates against transportation property owners. The language is, therefore, intended to provide for relief from acts that are imminent or are likely to recur, and not retrospective relief. Atchison, Topeka, & Santa Fe Ry. v. Lennen, 531 F. Supp. 220, 237 (D. Kan. 1981).

B. Principles of comity mandate a narrow construction of the relief provision of Section 306.

The United States Supreme Court has recently reenunciated the long-standing doctrine that federal courts exercise extraordinary restraint in adjudicating actions that would affect state tax affairs. Equitable restraint in state tax matters is "particularly appropriate because of the delicate balance between federal authority and state governments, and the concomitant respect that should be accorded to state tax laws in federal courts." Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 107-09 (1981). Congress was clear in excepting Section 306 from the broad ban of the Tax Injunction Act, 28 U.S.C. § 1341. Section 306(2). However, in light of the equitable restraint doctrine, the Court concludes that the exception of section 306(2) must be given a narrow construction. Any ambiguity in the word "terminate," therefore, will not be interpreted as an indication that federal district courts may open state coffers to plaintiff railroads seeking refunds of past tax payments. Only prospective relief should be allowed.

C. The Eleventh Amendment bars retrospective relief recovery.

The Eleventh Amendment[2] mandates that a federal court cannot assert jurisdiction over a suit by a private

[2] The Eleventh Amendment reads:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

party seeking to impose a liability that must be paid from public funds in the state treasury. Edelman v. Jordan, 415 U.S. 651, 663 (1974). Congress may in certain circumstances abrogate states' Eleventh Amendment immunity from suit in federal court by enacting legislation pursuant to the Commerce Clause. Parden v. Terminal Ry., 377 U.S. 184, 190-98 (1964). Congressional abrogation, however, is not to be inferred; it must be clear from the language of the law enacted. Employees of the Dept. of Public Health & Welfare v. Department of Public Health & Welfare, 411 U.S. 279, 283-87 (1973); *see* Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976); Parden, *supra* at 187-90; Tribe, Intergovernmental Immunities in Litigation, Taxation, & Regulation: Separation of Powers Issues in Congroversies about Federalism, 89 Harv. L. Rev. 682, 691 (1976). Section 306 does not clearly vest federal district courts with the authority to force states to refund tax payments once made. Thus, the Court concludes that it would be in violation of the Eleventh Amendment were it to order the State of Iowa to make the refund of tax payments requested by plaintiff.

In summary, the most reasonable interpretation of Section 306 does not permit the Court to direct defendant to refund the taxes plaintiff paid before filing this action. Furthermore, the Court is barred by the Eleventh Amendment from ordering defendant to make the refund. Accordingly defendant's motion to dismiss will be granted. Plaintiff's request for refund of any portion of its taxes paid before filing this action will be denied.

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against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

II. The Personal Property Taxation Issue.

Plaintiff's contention that the State of Iowa assessed and sought to collect tax payments on plaintiff's personal property while allowing nearly all other personal property owners to exempt their personalty from taxation, in the second half of tax year 1981 and in tax year 1982, is now ready for ruling. This court has jurisdiction over the personal property taxation issue under section 306; 28 U.S.C. § 1337, as the issue arises from an act of Congress regulating interstate commerce; and 28 U.S.C. § 1331.

A. Section 306.

The Eighty-sixth Congress requested a national transportation policy study. A preliminary draft was presented to the Eighty-seventh Congress in 1961. One of the conclusions drawn from the study was that property taxation in many states had, for many years, operated in a fashion inherently discriminatory against the railroads. Fifteen years later in 1976, Congress passed Section 306.[3]

Section 306 prohibits states from committing any of the following acts:

> "(a) The assessment . . . , for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

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[3] For a more complete review of the history see Clinchfield R.R. v. Lynch, 700 F. 2d 126, 128 n.1, (4th Cir. 1983), and Ogilvie v. State Bd. of Equalization, 657 F. 2d 204, 206-07 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."

Section 306(1). The purpose of Section 306 is to remedy discriminatory taxation against railroads. Ogilvie v. State Bd. of Equalization, 657 F. 2d 204, 207 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). Section 306 is directed toward both state real and personal property, and remedies under Section 306 should be tailored to eliminate discrimination in both categories. Clinchfield R.R. v. Lynch, 700 F. 2d 126, 129 (4th Cir. 1983).

B. The Relevant Portion of Iowa's Tax System.

In Iowa, as in most states, railroads' operating property is valued for property tax purposes as a unit. Under the unit concept of value, the fair market value of railroad operating property is measured by appraising the whole property as a going concern because it derives its true value not from the sum of its parts, but from the integrated use of the parts to carry traffic, render public service and, from the investors standpoint, generate income. The various states in which a particular railroad operates have various statutory formulas under which a portion of the value of the unit is allocated to that state. Under the Code of Iowa all real and tangible personal property subject to taxation in Iowa, including rail transportation property, is to be valued at its "actual value" and shall be assessed at 100% of its actual value. Actual

value is defined as the fair and reasonable market value or the fair and reasonable exchange in the year in which the property is listed and valued between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and each being familiar with all the facts relating to the particular property. The parties have stipulated that "actual value" as used in Iowa Code § 434.15, and "true market value," as used in Section 306, are synonomous. Pretrial Stipulation, paragraph 9.

In 1973 Iowa embarked on a program to reduce and eventually eliminate taxation of personal property for all but a few commercial and industrial personal property owners. Under Iowa Code § 427A.11, local tax assessors reduce the assessed value of each taxpayer's personal property so that the total assessed value of all personal property in the assessing jurisdiction does not exceed the total actual value of personal property in that jurisdiction as of January 1, 1973, excluding livestock. This statutory scheme will be referred to as the "rollback" provision.

Section 427A.2, Code of Iowa, allows a credit, not to exceed $10,000, against the rolled-back, assessed value of tangible personal property owned by persons and business enterprises. In addition, under Iowa Code § 427A.9, each locally-assessed personal property taxpayer is granted an additional personal property tax credit which increases in relation to the growth of state general fund revenues. The general fund revenues are intended to replace, at least in part, the revenues in the local jurisdiction that have been lost as a result of the decreased personal property tax. Both the Section 427A.2 and 427A.9 tax "credits" are more properly termed tax "exemptions" because they serve to reduce the valuation figure to which the tax rate is applied. They are not credits against the tax.

The Iowa personal property tax plan calls for an increase in the statutory exemption in nine phases. After the ninth phase is implemented, all state tax on personal property *taxed as personal property* will have been eliminated. The personal property tax plan is currently in its fourth phase.

Certain property that would commonly be characterized as "personal property" is statutorily designated to be "real property" under the Iowa tax system. Iowa Code § 427A.1. Thus, as stipulated by the parties, all tangible commercial and industrial personalty owners are benefitted by the rollback and exemption provisions, except those owners of personalty excluded by Iowa Code § 427A.1. The types of personalty excluded from the benefits of the rollback and exemption provisions are: (1) all property commonly characterized as personalty owned by public service companies that are centrally assessed by the Department of Revenue (including railroads); (2) machinery used in manufacturing; (3) computers; and (4) transmission towers and antennae. Thus, it will be necessary to classify personalty affected by the rollback and exemption provisions as "exempt personal property," and personalty excluded by Section 427A.1 as "non-exempt."

The benefits from which owners of non-exempt personal property are excluded are significant. The rollback provision has resulted in an assessed value of exempt personal property that is considerably less than its true market value. As a result of the rollback provision, the assessed value of exempt personal property was reduced by 63% in tax year 1981 and by 67% in tax year 1982. The exemption provisions, taken cummulatively, have served to further reduce the tax valuation figure for owners of exempt personal property by an additional $175,000 for tax years 1981 and 1982.

C. Segregation of plaintiff's personal property.

The primary issue in this action is whether the Court may consider plaintiff's evidence tending to show that over one-half of the value of plaintiff's property, allocated to Iowa, represents value of property of a type commonly characterized as personal property. The parties have stipulated to the portion of plaintiff's unit value that is properly allocated to Iowa. Defendant, however, argues that plaintiff's property, as allocated to Iowa under the unit value concept, must be considered by the Court to be inseparable. Thus, defendant contends that all plaintiff's property can be compared only in the aggregate to all other commercial and industrial property, both real and personal. Accordingly, defendant presented no evidence of what portion of plaintiff's property allocated to Iowa is of a type commonly characterized as personalty.

Plaintiff presented evidence to show that, for tax years 1981 and 1982, between fifty-one and fifty-four percent of plaintiff's property allocable to Iowa is of a type commonly characterized as personalty. This evidence was derived by two expert witnesses called by plaintiff. Mr. Steven L. Wood submitted an affidavit and testified on the basis of an analysis of plaintiff's annual reports to the Interstate Commerce Commission [hereinafter "I.C.C."]. By segregating the book values (in the accounts in each I.C.C. report) that were representative of the value of property commonly characterized as either "personal" or "real," Mr. Wood testified that in tax years 1981 and 1982, the portion of plaintiff's Iowa property that was personalty was 53.80% and 53.12%, respectively.

Dr. Arthur A. Schoenwald testified at trial on the basis of a mode of segregating railroad personal and real property that he had done in Minnesota. Dr. Schoenwald also testified that his analysis was of a type commonly used in

North Dakota and Illinois to segregate railroad personalty from realty. Based on the book values of the various accounts in the I.C.C. annual reports, Dr. Schoenwald determined the portion of plaintiff's unit value allocable to Iowa that is commonly characterized as personal property. The results of Dr. Schoenwald's calculations were that in tax years 1981 and 1982, the portion of plaintiff's unit value allocable to Iowa that was personalty was 54% and 53%, respectively.

The Court finds that the analysis of Mr. Wood and Dr. Schoenwald are valid and reliable methods of determining approximately the portion of plaintiff's unit value allocable to Iowa that represents property of a type that is commonly classified as personal property, the results of Dr. Schoenwald's calculations were subject to fluctuation, depending on the type of depreciation method used or the values given certain types of property. However, the depreciation-method used by Dr. Schoenwald is that commonly used in calculating real-personal property splits, and the values given were not shown to be unreasonable under current circumstances and accepted tax-accounting standards. Although there is no clear relationship between book value and actual value, the difficulty of precisely determining the actual value of real and personal property valued as a unit, should not be a barrier to the implementation of Section 306. Thus, the Court will accept the personal property "breakout" method and calculations by plaintiff, without significant amendment.

The issue remains whether it is appropriate under Section 306 to distinguish personal from real property. Defendant cites no legal authority to support his contention that plaintiff's property is inseparable. Plaintiff relies on caselaw from the courts of appeal for the Eighth and Fourth Circuits to support its contention that drawing the distinction is proper in circumstances in which a party

proves the distinction with valid and reliable evidence. Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 454 (D. N.D. 1980) (citing legislative history distinguishing personal and real property), *aff'd*, 657 F. 2d 208 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); Clinchfield R.R. v. Lynch, 700 F. 2d 126, 133-34 (4th Cir. 1983) (indicating that personal and real property should be distinguished).

The purpose of Section 306 could be thwarted were federal courts to accept the argument that defendant raises. The facts in this case provide an appropriate example. The obvious discrimination resulting from Iowa's rollback and exemption statutes could not be remedied.[4] Furthermore, the discrimination, albeit blatant, may not rise to the five-percent limit set by Section 306(2)(c) in all circumstances. In circumstances in which transportation property taxation discrimination is designed as part of the statutory tax system itself, federal courts have held that the five-percent limit should not be construed to vitiate the clear intent of Congress in enacting Section 306. Trailer Train Co. v. State Bd. of Equalization, 697 F. 2d 860, 866 (9th Cir. 1983); Burlington Northern R.R.

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[4] The Court realizes that some classification systems may have such minor discriminatory impact on transportation property owners that they would not violate Section 306. The Iowa personal property tax plan, however, affecting such a large portion of property in Iowa and designed to exempt select types of personalty from taxation, is not of that sort.

In addition, the Court does not imply that transportation property should be compared to types of property that are traditionally tax-exempt, such as property owned by churches and charitable institutions, and homesteads. Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 455 (D. N.D. 1980), *aff'd*, 657 F. 2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). Again, however, the facts do not present that sort of comparison.

v. Department of Revenue, 570 F. Supp. 585, 595 (W.D. Wis. 1983).

Because there is precedent supporting the segregation of real from personal transportation property in Section 306 analysis, and policy reasons for doing so in circumstances in which de jure[5] discrimination is alleged, the Court concludes that plaintiff's "breakout" of its transportation property that is commonly characterized as personalty must be accepted in this action. The Court concludes that plaintiff has shown that fifty-percent of its transportation property in Iowa is properly characterized as personal property, and would be so characterized were it not for Iowa Code § 427A.1(h).

D. Classifying the claim: do the facts present a de facto tax discrimination claim or an "any other [discriminatory] tax" claim.

Defendant contends that the facts in this action require the Court to analyze plaintiff's claim as a de facto discrimination claim, governed by sections 306(1)(a), 306(2)(c), and 306(3)(c). This contention is based primarily on defendant's attempt to distinguish Ogilvie v. State Bd. of Equalization, 492 F. Supp. 456 (D. N.D. 1980), *aff'd*, 657 F. 2d 204 (8th Cir.) *cert. denied*, 454 U.S. 1086 (1981). According to defendant, *Ogilvie* is distinguishable

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[5] "De jure" discrimination occurs in circumstances in which transportation property is required by statute to be assessed or taxed at a rate different from other commercial and industrial property. In contrast, "de facto" discrimination occurs in circumstances in which, though the taxation system is not designed to cause differing assessment or taxation rates, the operation of the system results in such disparity. Burlington Northern R.R. v. Lennen, 715 F. 2d 494, 497 (7th Cir. 1983); Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 785 (E.D. N.C. 1981), *aff'd*, 700 F. 2d 126 (4th Cir. 1983). Both forms of discrimination are proscribed by Section 306.

on the ground that, under the North Dakota tax system challenged in *Ogilvie*, the assessment ratio of Section 306(1)(a) was not affected by the inclusion of railroad personalty and the exclusion of all commercial and industrial personalty. In this action, the challenged tax scheme does not directly affect the transportation personal property assessment percentage but does affect the commercial and industrial personalty assessment percentage, thus affecting the assessment ratio. Notwithstanding the plausibility of defendant's proposed distinction of *Ogilvie*, however, the Court is convinced that the rationale underlying the Section 306(1)(d) analysis in *Ogilvie* opinion applies with full force in this action.

In *Ogilvie* the United States Court of Appeals for the Eighth Circuit could have carried out the de facto discrimination analysis called for by defendant. Certain centrally-assessed commercial and industrial personalty was taxed in North Dakota; only locally-assessed commercial and industrial personalty was exempt. *See* Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 455 (D. N.D. 1980), *aff'd*, 657 F. 2d 204, 209-10 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). Thus, assessment percentages for both personal and transportation property and personal commercal and industrial property (including centrally and locally assessed types) could have been calculated. The Court of Appeals, however, determined that such an analysis was inappropriate. In circumstances similar to those presented here, the Court of Appeals decided that discriminatory taxation, implemented through selective classification of property, presented a case of *de jure* discrimination proscribed by Section 306(1)(d). Ogilvie v. State Bd. of Equalization, 657 F. 2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). The Court will follow the well-reasoned analysis of the Court of Appeals in *Ogilvie*.

The most significant effect of accepting defendant's argument that this is a *de facto* discrimination claim would be that the very large statutory personal property tax exemptions would be irrelevant to the analysis. This is because, as pointed out by plaintiff, the statutory exemptions would be excluded from the analysis under the last clause of Section 306(3)(c).[6] In this action, plaintiff has shown with valid and reliable evidence that the statutory $175,000-per-year exemption (in conjunction with the rollback) has the effect of reducing to approximately five percent the portion of personal property owners who have to pay any tax on their personal property. The court accepts plaintiff's proof and, additionally, finds that the statutory exemption is the most significant factor resulting in such a small percentage of Iowa personal property owners paying a tax on their personal property. It would be illogical to make irrelevant the statutory exemption which has the most discriminatory effect on the taxation of plaintiff's transportation property. Congress could not have intended such a result in enacting Section 306(3)(c).

Another effect of treating this is a *de facto* discrimination claim would be that non-exempt personal property, other than transportation property, would significantly affect the ratio calculation. The Court finds that defendant has shown that approximately one-half the value of all personal property in Iowa is excluded from the tax benefits of the rollback and exemptions by the classification system provided for in Iowa Code § 427A.1. The fact that a number of personal property owners other than railroads are discriminated against in the same manner as

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[6] The last clause of Section 306(3)(c) excludes all commercial and industrial property not subject to a property tax levy from the term, "commercial and industrial property," as used in sections 306(1)(a)-(c).

plaintiff should not affect plaintiff's claim for relief under Section 306. *See* Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 455 (D. N.D. 1980), *aff'd*, 657 F. 2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). Thus, the Court concludes that it would not be in keeping with Section 306 to aggregate all commercial and industrial personal property because doing so would serve to skew the analysis and reduce the calculated quantity of tax discrimination against plaintiff that is actually occurring under the Iowa personal property tax plan.

In summary, the Court concludes, for the reason stated above, that plaintiff's claim is properly to be treated as an "any other [discriminatory] tax" claim, governed by Section 306(1)(d) and the rationale of *Ogilvie*.

E. Section 306(1)(d) Analysis.

Plaintiff contends that all its personal property should be exempted from taxation under a proper mode of analysis. According to plaintiff, it must be treated as the median taxpayer who owns exempt personal property and who, in turn, benefits from the Iowa personal property tax plan. Plaintiff has shown that well over fifty-percent of such taxpayers do not pay any tax on their personal property taxed as personal property because of the $175,000 exemption. Therefore, plaintiff asks the Court to order that it not pay any tax on its approximately $30 million worth of property properly classified as personalty.

The Court finds no reason to craft such a crude form of relief in circumstances in which relief can be tailored to remedy the specific discrimination shown to exist. In addition, there is no case law showing that the "median approach" is appropriate in Section 306(d)(1) cases. Rather, precedent indicated that the relief should eliminate only the type of tax discrimination proved to exist,

without considering a fictional median taxpayer. *See, e.g.*, Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 455 (D. N.D. 1980), *aff'd*, 657 F. 2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); Alabama Great Southern R.R. v. Eagerton, 541 F. Supp. 1084, 1087 (M.D. Ala. 1982); *see also* Atchison, Topeka, & Sante Fe Ry. v. Bair, 535 F. Supp. 68, 69-71 (N.D. Iowa 1982). Accordingly, the Court will grant relief in form intended to eliminate the specific type of tax discrimination proven by plaintiff in this portion of this civil action.

IT IS THEREFORE ORDERED that defendant's motion to dismiss plaintiff's request for tax-payment refunds for tax years 1979 and 1980, and the first half of tax year 1981, shall be and hereby is granted.

IT IS FURTHER ORDERED that, pursuant to sections 306(1)(d) and 306(2) of the Railroad Revitalization and Regulatory Reform Act of 1976, defendant is enjoined from excluding fifty percent of plaintiff's unit value, which is properly characterized as personal property, allocable to Iowa, from the tax benefits derived from the rollback and exemption provisions of Iowa Code §§ 427A.11, .2, and .9, for the second half of tax year 1981 and tax year 1982.

Signed this 20th day of April, 1984.

W. C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA.

APPENDIX B
PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 82-1873, 82-1878, 82-1891

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,

Plaintiffs-Appellees,

v.

MICHAEL LENNEN, *et al.*,

Defendants-Appellants,

UNION PACIFIC RAILROAD COMPANY, *et al.*,

Plaintiffs-Appellees,

v.

THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, *et al.*,

Defendants-Appellants,

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *et al.*,

Plaintiffs-Appellees,

v.

MICHAEL LENNEN, et al.

Defendants-Appellants,

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Plaintiffs-Appellees,

v.

MICHAEL LENNEN, et al.

Defendants-Appellants,

BURLINGTON NORTHERN, INC., *et al.*,
Plaintiffs-Appellees,

v.

PHILIP W. MARTIN, *et al.*,
Defendants-Appellants.

FILED

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

APRIL 27 1984

HOWARD K. PHILLIPS
Clerk

Appeal from the United States District Court
For the District of Kansas
(D.C. Nos. 80-1690, 80-4172, 80-4173, 80-4176, 80-4181)

Carol B. Bonebrake, Attorney, Department of Revenue, Topeka, Kansas, (James J. McGannon of Regan & McGannon, Wichita, Kansas, with her on the brief) for the state Defendants-Appellants/Cross-Appellees.

Robert J. O'Connor (Jeff A. Roth, also of Hershberger, Patterson, Jones & Rogh, Wichita, Kansas; Donald J. Horttor and Grant M. Glenn of Cosgrove, Webb & Oman, Topeka, Kansas; and Paul M. Buchanan, Assistant County Counselor, Wichita, Kansas, with him on the brief) for the county Defendants-Appellants/Cross-Appellees.

Robert C. Foulston (Jay F. Fowler with him on the brief) of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, for Plaintiffs-Appellees/Cross-Appellants.

Before MCKAY, LOGAN, AND SEYMOUR, Circuit Judges.

LOGAN, Circuit Judge.

This is an appeal from an order enjoining defendants Kansas Secretary of revenue Michael Lennen, Director of Property Valuation of the Kansas Department of Revenue Philip Martin, and the Kansas Department of Revenue ("state defendants") from assessing the plaintiff railroads' property at more than 12.4% of true market value as the basis for 1980 property taxes. *Atchison, Topeka and Santa Fe Railway v. Lennen*, 552 F. Supp. 1031 (D. Kan. 1982). A number of Kansas county treasurers ("county defendants") intervened as defendants in this case, and they also appeal. Plaintiffs cross-appeal from an order dismissing their claims for restitution of alleged overpayment of property taxes for 1979.

All defendants contend on appeal that the district court erred (1) by allowing plaintiffs to prove the assessment ratio for "all other commercial and industrial property" by means of a study based on real property only; (2) by not giving proper weight to the assessment ratio for state-assessed property other than railroad property in determining the assessment ratio for "all other commercial and industrial property"; and (3) by admitting the official Kansas sales assessment ratio study into evidence. The county defendants argue that the district court should have ordered the Wichita railroads to pay 18% interest on their delinquent 1980 taxes. On cross-appeal plaintiffs argue that the district court erred in ruling that the railroads could not receive restitution for overpayment of 1979 taxes.

The Statute

In 1976 Congress enacted legislation prohibiting states from discriminating against rail transportation property in the assessment, levying, and collection of property taxes. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306, 90 Stat. 31, 54.[1] Section 306 was first codified at 49 U.S.C. § 26c. The language of § 306 was changed and recodified at 49 U.S.C. § 11503 as part of the Revised Interstate Commerce Act of 1978, 49 U.S.C. §§ 10101-11917. Because the revision was not intended to change the law, we must resolve any substantive conflicts between the original language of § 306 and the language in § 11503 in favor of the original language. *Atchison, Topeka and Santa Fe Railway v. Lennen*, 640 F.2d 255, 257-58 (10th Cir. 1981). Because this appeal involves difficult questions of statutory construction, the original language of § 306 is important. That section provided:

> "Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:
>
> 'Sec. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or

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[1] The 94th Congress produced little legislative history concerning § 306. The bulk of the relevant legislative history comes from two earlier bills that were similar to § 306, S. 927, 90th Cong., 1st Sess., 113 Cong. Rec. 2887 (1967) and S. 2289, 91st Cong., 1st Sess. 115 Cong. Rec. 14332 (1969). *See Clinchfield R.R. v. Lynch*, 700 F.2d 126, 128 n.1 (4th Cir. 1983).

subdivision to commit any of the following prohibited acts:

'(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

'(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

'(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

'(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

'(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

'(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

'(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

'(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment juridsiction;

'(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

'(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction which is included in such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

'(3) As used in this seciton, the term—

'(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

'(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

'(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

'(d) "transportation property" means transportation property, as defined in regulations of the Commission which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.'."

Railroad Revitalization and Regulatory Reform Act of 1976, P.L. No. 94-210, § 306, 90 Stat. 31, 54-55.

Kansas Property Taxation

Kansas law requires that all property subject to a property tax be assessed at 30% of its fair market value. Kan. Stat. Ann. § 79-1439. Each year the Kansas director of property valuation appraises railroads and other public utilities on a unit basis. The director determines the total value of a particular public utility, including both real and personal property, and then determines the portion of that value that is to be assigned to Kansas and the portion

of the Kansas value that is to be assigned to each county. County appraisers, rather than state appraisers, determine the value of other property in Kansas subject to property taxation. They appraise personal property each year, but they appraise real property less frequently because Kansas law prohibits countywide reappraisal of real property as the basis for levying taxes until the director of property valuation certifies reappraisal. Kan. Stat. Ann. § 79-1451. The last reappraisal of real property took place during the period from 1963 to 1971. The combined effect of infrequent reappraisal and inflation is that the ratio of assessed value of county-assessed real property is its true market value is almost always below 30 percent.

In 1980, the commercial and industrial property base in Kansas, excluding railroads, 60% was locally-assessed personal property, 15% was locally-assessed real property, and 25% was state assessed.

The Proceedings Below

In June 1980 the Atchison, Topeka and Santa Fe Railway Company sued the state defendants under 49 U.S.C. § 11503, alleging that Kansas was discriminating against railroad property in the assessment and collection of property taxes.[2] The same day the Union Pacific Railroad Company and the St. Joseph and Grand Island Railway Company filed a similar complaint against the state defendants. Subsequently, two other railroads, the Chicago, Rock Island and Pacific Railroad Company and the Missouri-Kansas-Texas Railroad Company, each filed similar suits. We will refer to the plaintiffs in those four

[2] For a more detailed description of the early proceedings in this case, see *Atchison, Topeka and Santa Fe Ry. v. Lennen*, 531 F. Supp. 220 (D. Kan. 1981).

suits as "the Topeka railroads." In September 1980 seven other railroads[3] ("the Wichita railroads") filed a similar suit. In addition to their claim based on 1980 taxes, the Wichita railroads sought restitution of alleged overpayment of property taxes for 1979.

In November 1980 the district court denied the Topeka railroads' request for a preliminary injunction to restrain the State of Kansas from collecting the disputed taxes assessed against the Topeka railroads for the first half of 1980, which were due on December 20, 1980. The Topeka railroads took an emergency appeal to this Court, and this Court granted a temporary injunction pending the resolution of the appeal. Thereafter, the district court granted the Wichita railroads' request for a preliminary injunction pending the resolution of the Topeka railroads' appeal. The district court found that the entire amount levied against the Wichita railroads for the first half of 1980 was in dispute because the Wichita railroads sought to offset their alleged overpayments of 1979 taxes against their 1980 payments. Therefore, the district court allowed the Wichita railroads to pay the entire amount levied against them into the registry of the court, pursuant to Fed. R. Civ. P. 67.

Shortly thereafter this Court held that the district court should have granted the Topeka railroads' request for an injunction. *Atchison, Topeka and Santa Fe Rail-*

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[3] The Wichita railroads are: the Burlington Northern, Inc.; the Chicago and Northwestern Transportation Co.; the Kansas City Southern Railway Co.; the Kansas and Missouri Railway and Terminal Co.; the Kansas City Terminal Railway Co.; the Missouri Pacific Railroad Co.; and the St. Louis-San Francisco Railway Co. On March 4, 1981, the parties stipulated that the Burlington Northern, Inc. should be substituted as the successor in interest to the St. Louis-San Francisco Railway Co.

way v. Lennen, 640 F.2d 255 (10th Cir. 1981). Therefore, the preliminary injunctions remained in effect. The district court allowed the Topeka railroads to deposit the disputed taxes, 58% of the amounts levied against them, into the registry of the court.

The Topeka railroads then filed amended complaints, which added claims based on taxes they had paid in 1979, and all the railroads amended their complaints to name various county officials as defendants. Subsequently, all the cases were consolidated for further proceedings. After hearings the district court dismissed the Topeka and Wichita railroads' claims based on 1979 property taxes, and because the county defendants were named only in regard to the claims based on 1979 taxes, the district court dismissed the county defendants from the suit. The county defendants later reappeared as parties when the district court granted their motion to intervene. Thereafter, the district court ordered the clerk to distribute to the appropriate counties 40% of the Wichita railroads' deposit with the registry, which was the amount no longer in dispute, together with 40% of the interest that had accrued on the deposit.

At the trial, which took place in February 1982, the district court found for plaintiffs and enjoined defendants from assessing against or collecting from plaintiffs 1980 property taxes based on an assessment higher than 12.2% of true market value. 552 F. Supp. 1031. Subsequently, the district court amended the judgment to prohibit assessment at a level higher than 12.4%.

I

Defendants argue that the railroads failed to meet their burden of proof under § 306 because they did not offer evidence of the ratio of the assessed value of commercial

and industrial *personal property* to its true market value. To evaluate that argument we must first determine what a plaintiff must show to establish a case under § 306.

Section 306(2)(d) provides: "[T]he burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law." Under Kansas law the "burden of proving a disputed fact or issue rests upon the party asserting it as a basis of his claim." *Bowen v. Hathaway*, 202 Kan. 107, 446 P.2d 723, 272 (1968).[4]

Section 306(1)(a) prohibits

> "[t]he assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purpose of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property."

Section 306(2)(c) provides for relief when the assessment ratio for railroad property exceeds the assessment ratio for other commercial and industrial property by 5%.

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[4] The district court held that plaintiffs had to prove their case by clear and convincing evidence. The court cited *Northern Natural Gas Co. v. Williams*, 208 Kan. 407, 493 P.2d 568 (1972), in support of that holding. It is not clear to us why the district court held that the standard was clear and convincing evidence. Preponderence of the evidence is the usual standard under Kansas law. *See In re Wright's Estate*, 170 Kan. 600, 228 P.2d 911, 914 (1951).

A plaintiff may easily determine the true market value of its railroad property[5] and its assessed value, which presumably will be 30% of its true market value. Its real burden is to prove the true market and assessed values of "all other commercial and industrial property." A plaintiff must then show that the ratio of assessed value to true market value of the railroad property is at least 5% greater than the ratio of assessed value to true market value for "all other commercial and industrial property."

The issue here is whether plaintiffs presented sufficient evidence to prove the ratio of the assessed value to true market value for "all other commercial and industrial property." Section 306(3)(c) defines "all other commercial and industrial property" as "all property, real or *personal*, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy." (Emphasis added.) To meet their burden of proof plaintiffs introduced the Kansas Real Estate Assessment/Sales Ratio Study for 1980, which was conducted pursuant to Kan. Stat. Ann. §§ 79-1435 to 1436b. The Kansas study examines the relationship between the assessed value and the sales price of *real property*. Plaintiffs also produced expert testimony interpreting the Kansas study. Dr. Frederick Ekeblad, one of the plaintiffs' expert witnesses, testified that the study showed that commercial and industrial real property in Kansas

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[5] In *Burlington Northern Railroad v. Lennen*, 715 F.2d 494 (10th Cir. 1983), we held that Congress did not intend by enacting § 306 for the federal courts to become involved in challenges to the true market valuation figures arrived at by state officials for railroad properties unless the railroad could make a strong showing of purposeful overvaluation with discriminatory intent.

was assessed at 12.1% of its true market value. Plaintiffs offered no evidence of the assessment ratio for personal property in Kansas. Defendants introduced evidence showing that the assessment ratio for personal property was higher than the assessment ratio for real property and was probably close to 30% of true market value.[6]

The district court held that an assessment ratio derived from a study of real estate was prima facie proof of the assessment ratio for "all other commercial and industrial property" and therefore ruled that plaintiffs had established a prima facie case unser § 306(1)(a). The district court adopted the reasoning of the district court in *Clinchfield Railroad v. Lynch*, 527 F. Supp. 784, 787 (E.D.N.C. 1981), *aff'd on other grounds*, 700 F.2d 126 (4th Cir. 1983), which interpreted § 306(2)(e) as an expression of congressional intent that the assessment ratio derived from a sales assessment ratio study of real estate should represent the assessment ratio for all other commercial and industrial property. Section 306(2)(e) provides:

> "[I]n the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property

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[6] Dr. Allison Manson, a professor of statistics at North Carolina State University, testified that he had conducted a sales assessment ratio study on personal property in Saline County, Kansas, and had determined that the median assessment ratio for commercial and industrial personal property was 26.83% of true market value. Also, eleven county appraisers testified and described the methods they used to assess personal property. Each county appraiser testified that he thought personal property in his county was appraised at 28 to 30% of true market value. The district court noted that defendants had introduced evidence "tending to show" that the assessment ratio for personal property "approached" 30%.

> cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in cntravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district."

Plaintiffs point out that § 306(2)(e) expresses a preference for the sales assessment ratio studies as a means of establishing discrimination. They argue that Congress was aware that a sales assessment ratio study is a study of real property and that Congress intended such real estate studies to be representative of the assessment ratio for "all other commercial and industrial property." Congress did so, plaintiffs argue, because of the difficulty of conducting sales assessment ratio studies of personal property.

We disagree. Although we recognize that § 306 is not a model of precision or clarity, we do not think Congress' inclusion of personal property in the definition of "all other commercial and industrial property" was purposeless or inadvertent. In a hearing on an earlier version of § 306, Senator Hansen of Wyoming questioned Philip Lanier, a railroad vice-president, about the fact that the proposed bill would permit a comparison of real property on one hand and real and personal property on the other.

State Tax Discrimination Against Interstate Carrier Property: Hearing on s. 2289 Before the Subcomm. on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st sess. 43-45 (1969) (testimony of Philip Lanier, vice-president of the Louisville & Nashville Railroad Co.). Senator Hansen later introduced an amendment to S. 2289 that specifically included personal property in the definition of the type of property to which railroad property was to be compared. The Senate adopted the amendment. Cong. Rec. S2023 (daily ed. Jan. 30, 1970). All the successor bills to S. 2289 specifically included personal property in that definition. Plaintiffs' construction of § 306(2)(e) ignores Senator Hansen's amendment.

Although the legislative history shows that Congress knew that sales assessment ratio studies were normally conducted on real property only, plaintiffs cite nothing in the legislative history that suggests Congress assumed that sales assessment ratio studies could not be performed on personal property. In fact, Dr. Rolf Weil, an expert in public finance and an expert witness for plaintiffs at trial, told a senate subcommittee that sales assessment ratio studies could be conducted for personal property:

> "It is by this technique that we can determine the level of assessments in a community. Normally State administrators as well as private industry, when they make such a study, limit the study to real estate. The reason for that is that it is a little more difficult to conduct such a study for personal property. It can be done for certain types of personal property, and invariably it would bring the ratio way down below the level you find by an analysis of real estate only."

State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on

Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess. 63 (1969) (statement of Rolf Weil, President, Roosevelt University). Although Dr. Weil's statement undermines plaintiffs' theory that Congress thought that sales assessment ratio studies could be conducted on real property only, his statement suggests an explanation of Congress' preference for a method of proof that is generally used for studies of real property despite the statute's inclusion of personal property in "all other commercial and industrial property." Congress may have assumed that Dr. Weil was correct in saying that the inclusion of personal property in a sales assessment ratio study would "invariably" lower the overall assessment ratio and also that Mr. Lanier was correct in telling a Senate committee that it was "universally true" that the assessment ratio for personal property would be lower than the assessent ratio for real property. State Tax Distrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess. 43-45 (1969) (testimony of Philip Lanier, vice-president of the Louisville & Nashville Railroad Co.). If Dr. Weil's contention were correct, then a plaintiff railroad would only hurt itself if it would not undertake the possibly arduous task of conducting a sales assessment ratio study for personal property. The Fourth Circuit drew the same conclusion in *Clinchfield:*

> "There might be some merit in the district court's position insofar as Congress may have taken for granted that the railroads invariably suffer worse treatment with regard to their personal property than they do with respect to their realty. Where that is the case, the extension of the ratio found for real property to personal property as well works no injustice, at least to the taxing authority."

Clinchfield Railroad v. Lynch, 700 F.2d at 133 n.11.

The evidence in this case clearly demonstrates that in Kansas the assessment ratio for personal property would not lower the overall assessment ratio. We do not think Congress intended railroads to enjoy a windfall in such a situation. We hold, therefore, that, on the facts in this case, the district court erred in allowing plaintiffs to prove the assessment ratio for all other commercial and industrial property by means of a study based on real estate only.[7]

Plaintiffs argue that if they cannot prove their case with a sales assessment ratio study of real estate, § 306(2)(e) requires a comparison of railroad property with all property that is subject to a property tax. They base that contention on their assertion that it is impossible to conduct a sales assessment ratio study of personal property. The assessment ratio for "all property," plaintiffs assert, would be as low as the assessment ratio for real property and defendants would gain nothing by prevailing on this issue. In response, we first note that plaintiffs have not shown that they cannot establish the assessment ratio for personal property by means of a sales assessment ratio study. Indeed, defendants' evidence suggested that such a study, although expensive, would be possible.[8] Also, although the legislative history

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[7] We do not determine whether § 306 creates a presumption that the assessment ratio for personal property is lower than the assessment ratio for real property. Even if such a presumption exists, defendants produced enough evidence to overcome it. *See supra* note 6.

[8] We doubt that such a study would be very costly in Kansas. Local appraisers assess personal property every year. They are required to use valuations in manuals provided to them by the state listing most standard items. Many valuations in the manuals—particularly vehicle valuations—are derived from national sales studies. Thus, for

does not reveal the purpose of § 306(2)(e),[9] we are certain that Congress did not intend to require defendants to forfeit the advantage of having residential, agricultural, and timber-producing real estate excluded from the assessment ratio if plaintiffs were required to prove the assessment ratio for personal property. Because Congress may not have contemplated a situation in which personal property assessment ratios were higher than real property assessment ratios, requiring plaintiffs to prove what those ratios are, Congress may never have considered the difficulty of conducting a sales assessment ratio study on personal property. Therefore, if the plaintiffs demonstrate on remand that preparing personal property sales assessment ratio studies would be prohibitively expensive, the trial court may permit plaintiffs and defendants to provide evidence on the level of assessment for personal property for less onerous forms of proof, such as appraisal studies and expert testimony.

The Fourth Circuit also concluded that § 306(2)(e) permits various types of proof to show the assessment ratio for personal property:

> "To the extent that the opinion of the district judge suggests that reliance should, under § 306(2)(e), be placed solely upon percentages derived from sales-assessment ratio studies of real estate to the ex-

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most personal property items the valuations in all counties will be the same, the figures are readily available from the state manuals, and many valuations may be easily compared with existing national sales studies such as the N.A.D.A. Official Used Car Guide.

[9] A possible explanation for § 306(2)(e) is that it discourages state governments from making real estate sales data inaccessible. If states make such data unavailable, then plaintiffs would have to prove the assessment ratio for all property subject to a property tax. This would eliminate the advantage states have by virtue of the

> clusion of a similar inquiry into personal property by way of appraisal studies and expert testimony, we do not approve what the district judge had to say. The statute makes clear that personal property, as well as real estate, is to be dealt with in the course of achieving equality and thereby eliminating discrimination. We affirm the result reached in the district court on the quite different ground that the proof of the state failed as to the necessary data relevant to personal property."

Clinchfield Railroad v. *Lynch*, 700 F.2d at 133 (footnotes omitted).[10]

II

Although neither party disputes the 30% assessment ratio for state-assessed non-railroad public utility property, defendants object to the method the district court used to factor that assessment ratio into the overall assessment ratio. The district court adopted Dr. Ekeblad's suggestion that the relevant assessment ratio would be the assessment ratio of the median parcel. Although Dr. Ekeblad testified that state-assessed property should not be considered at all, he suggested that the proper way to include such property would be to line up the 87,074 parcels of locally-assessed commercial and industrial real

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exclusion of agricultural and timber-producing property from the definition of "all other commercial and industrial property," and from the exclusion of residential real estate, which is often assessed at ratios comparable to agricultural real property.

[10] The court in *Clinchfield* held that the defendants had the burden of proving the assessment ratio for personal property. The holding was based on the burden of proof under North Carolina law. In North Carolina a showing of an "inequitable difference" rebuts the assumption that an appraisal is correct. The court found that the sales assessment ratio study of real estate that the plaintiffs introduced showed an "inequitable difference." 700 F.2d at 131-32.

estate and the 239 "parcels" of public utility property, find the middle "parcel," and use the assessment ratio for that parcel as the proper assessment ratio for transportation property. Under this method the inclusion of non-railroad public utility property in the assessment ratio for "all other commercial and industrial property" changed the overall assessment ratio only from 12.1% to 12.2%, even thought this property constituted 25% of Kansas' valuation base in 1980 for commercial and industrial property.

Defendants argue that the court should have used a "value weighted mean" to factor the assessment ratio for public utility property into the overall assessment ratio for "all other commercial and industrial property." That method would require the court first to figure the total assessed value of locally-assessed commercial and industrial real property, locally-assessed commercial and industrial personal property, and state-assessed public utility property; then to figure the total true market value of those three kinds of property; and finally to determine the ratio of the total assessed value to the total true market value.

We agree with defendants. A median has no significance if the items on the continuum are not alike in some relevant way. *See* International Association of Assessing Officers Assessment Standards Committee, Standard on Assessment Ratio Studies, § 2.10.3 (1980). "Parcel" as plaintiffs use it in this case is not a unit of measurement. In plaintiffs' calculations a small farm and an entire utility each are one "parcel." The median "parcel" seems an even more inappropriate measure in a case such as this where all "parcels" of personal property would also have to be included in the assessment ratio for "all other commercial and industrial property." When, as here, categories of

property that are subject to different methods of appraisal must be factored together to produce the assessment ratio for "all other commercial and industrial property," each category should be factored in in proportion to its share of the total true market value of all such property. *Cf. AFC Industries, Inc.* v. *Arizona*, 714 F.2d 93, 95 (9th Cir. 1983).

III

Defendants' third argument is that the district court erred by admitting the Kansas Assessment/Sales Ratio Study into evidence. Kansas law prohibits the introduction of the study "in actions involving the assessment of property, sales of which are not required to be reported by county assessors to the director of property valuation under the provisions of K.S.A. 79-1436." Kan. Stat. Ann. § 79-1437b. Defendants also assert that the Kansas sales assessment ratio study is hearsay. However, Kansas evidentiary rules are not applicable in this case. Congress expressed a preference for the sales assessment ratio study as a means of proof, knowing that such a study contains hearsay. Also, the study meets the requirements of the residual exception to the hearsay rule: The statement if offered as evidence of a material fact; the statement is more probative on the point for which it is offered than any other evidence the proponent can produce through reasonable efforts; and the general purposes of the rules of evidence and the interests of justice will be served by admission of the statement. Fed. R. Evid. 803(24).

Defendants also argue that the Kansas study is unreliable. We do not think that the district court erred in finding that the Kansas study was reliable proof of the assessment ratio for real estate.

Taking a final stab at the Kansas study, defendants argue that it was inadmissible because it was not a random sample. The Kansas study included all sales of real estate in Kansas. A random sample of data is helpful only because it accurately depicts the universe of relevant data. The statutory requirement of a random sample is obviously intended to prohibit a selectively skewed sample, not to prohibit a comprehensive study.

IV

The county defendants argue that the district court erred by not ordering the Wichita railroads to pay interest on their delinquent 1980 taxes at the Kansas statutory rate of 18%. *See* Kan. Stat. Ann. § 79-2968. On December 16, 1980, the district court temporarily enjoined defendants from collecting any portion of the property taxes that had been levied against the Wichita railroads for the first half of 1980 and enjoined the county treasurers from penalizing the Wichita railroads for their failure to pay any of the taxes deposited with the court. The court found that all of those taxes were in dispute because the Wichita railroads claimed an offset against their 1980 taxes because of overpayment of their 1979 taxes. On December 20, 1980, the day Kansas property taxes for the first half of 1980 became due, the Wichita railroads deposited the entire $2,504,318.67 with the court pursuant to Fed. R. Civ. P. 67. The district court later dismissed the railroads' claims for restitution of overpayment of 1979 taxes. Because 60% of the 1980 assessment was still in dispute, the clerk distributed to the counties 40% of the Wichita railroads' deposit plus 40% of the interest that had accrued on that deposit.

The counties argue that they are entitled to the difference between the interest they received and the interest they would have received at the 18% statutory rate. They

also contend that the Wichita railroads' delinquent payment of their taxes for the first half of 1980 accelerated the due date for payment of their taxes for the second half of 1980. Because the Wichita railroads paid the counties 40% of the taxes assessed for the second half of 1980 close to the regular due date in June 1981, rather than in December 1980, the counties argue that those railroads owe 18% interest on the taxes for the second half of 1980.

In *Atchison, Topeka and Santa Fe Railway* v. *Lennen*, 640 F.2d 255, 261 (10th Cir. 1981), we held that a court considering whether an injunction should be granted under § 11503(c) must determine whether there is reasonable cause to believe that a violation of § 11503(b) has occurred or is about to occur. After our decision the preliminary injunction granted the Wichita railroads continued in effect. Defendants did not challenge the district court's implicit determination that reasonable cause existed to support continuation of that injunction.

The Wichita railroads did not ultimately prevail before the district court on their claim for restitution of taxes paid in 1979. However, the district court still had the power under § 306 to enjoin collection of the disputed taxes. To allow states to penalize taxpayers for delinquent payment of taxes, when the court has enjoined such payment, would frustrate the purposes of § 306. "[A]ny state law that frustrates or conflicts with the lawful objective of a federal statute must yield to the federal authority." *United States* v. *Composite State Board of Medical Examiners*, 656 F.2d 131, 135 n.4 (5th Cir. 1981); *see, e.g., Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379 (1963). The district court properly dismissed the counties' claims for interest.

V

In their cross-appeal plaintiff railroads argue that the district court improperly dismissed their claim for partial refunds of taxes paid in 1979. The district court concluded that the plain language of § 306 expressly limits relief to prospective relief. Section 306(2) provides:

> "the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary *to prevent, restrain or terminate* any acts of violation of this section."

(Emphasis added.)

Although the district court's interpretation of that language is sensible, we think several Supreme Court decisions require us to inquire further before determining what forms of relief are available under § 306. *See Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946); *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288 (1960); *see also ICC* v. *B & T Transportation Co.*, 613 F.2d 1182 (1st Cir. 1980). In *Porter* the Supreme Court held that restitution of rent was available under the Emergency Price Control Act of 1942 even though the Act expressly authorized only "a permanent or temporary injunction, restraining order or other order." The provision in the Emergency Price Control Act for any "other order" might be considered an important distinction between that act and section 306 were it not for the Supreme Court's decision in *Mitchell* v. *DeMario Jewelry, Inc.* In *DeMario* the Supreme Court held that restitution of lost wages was available under the Fair Labor Standards Act even though the express grant of jurisdiction in the FLSA was "to *restrain* violations of section 15." (Emphasis added.) To

support its holding the Supreme Court cited the following language from *Porter:*

> "Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances. . . .
>
> "Moreover, the comprehensiveness of this equitable jurisdiction is not be be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."

361 U.S. at 291 (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 397-98 (1946)). The *DeMario* Court concluded:

> "When Congress entrusts to any equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature. Clark v. Smith, 13 Pet. 195, 203.' "

361 U.S. at 291-92.

Because the Supreme Court would not infer a restriction on courts' power to grant restitution from Congress' grant of power under the FLSA to "restrain violations," we are unwilling to infer such a restriction from the language of § 302(2). Rather, as *DeMario* directs, we must determine whether restitution is necessary to effectuate the policy of § 306.

Congress enacted § 306 to help railroads escape discriminatory state property taxation. To allow states time to make corrections, Congress made § 306 effective on February 5, 1979, three years after its enactment. Those three years also gave the railroads time to marshall their forces and to prepare for litigation under § 306. Plaintiffs paid their 1979 Kansas property taxes without protest and did not file suit under § 306 until 1980. Nothing in plaintiffs' brief explains why they did not file suit until 1980.[11] No doubt the local taxing authorities promptly spent the money collected from railroads, pursuant to budgeting decisions already made. Plaintiffs present no equitable basis for their claims for restitution.

We hold that the district court correctly held that restitution was not necessary to further the policy of § 306. Thus, the dismissal of plaintiffs' claims based on 1979 taxes was proper.

AFFIRMED IN PART; REVERSED IN PART.

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[11] We do not determine whether § 306 applied to 1979 Kansas property taxes. *See Alabama Great Southern R.R. v. Eagerton*, 474 F. Supp. 60 (D. Ala. 1979).